IN THE

SUPREME COURT OF THE UNITED STATES

AUGUST TERM, 1985

No. A-968

DEBBY BOCK,

Petitioner,

v.

THE STATE OF NEW YORK, ROBERT STEINGUT, Chairman, and ILENE J. SLATER, SEYMOUR POSNER and HENRY M. CHRISTMAN, Commissioners, Individually and as Members of the WORKERS' COMPENSATION BOARD of the State of New York, and the ATTORNEY GENERAL of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 29, 1985

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JOSEPH F. SPANIOL, JR.
CLERK

QUESTIONS PRESENTED FOR REVIEW

1. Whether there exists infringement of Petitioner's rights as to:

a. her freedom of speech and to petition the government for a redress of grievances (U.S. Const. Amend. I; 5 USC § 702; Administrative Procedure Act ("APA") § 10);

b. security in her person against unreasonable searches (U.S. Const. Amend. (IV);

c. life, liberty, or property, and due process of law (U.S. Const. Amends. V and XIV(§1));

d. trial by jury in a suit at common law where the value exceeds twenty dollars (U.S. Const. Amend. VII);

e. cruel and unusual punishment inflicted (U.S. Const. Amend. VIII); and

f. equal protection of the law (U.S. Const. Amend. XIV(§1)).

2. Whether the merits of the case have ever been reached.

3. Whether the District and Circuit Courts proceeded in conformity with the

Administrative Procedure Act, the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Appellate Procedure ("FRAP").

4. Whether the District and Circuit Courts demonstrated bias (28 USCA § 144) and proceeded in violation of Petitioner's substantial rights.

5. Whether the District and Circuit Courts can, as a matter of law, dismiss the complaint without an answer.

6. Whether the District and Circuit Courts can render just determinations based upon findings which are not supported by substantial evidence of the prior proceedings and are erroneous.

7. Whether Petitioner is entitled to a trial by jury, collateral review and damages for injuries suffered due to deprivation of her rights.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The pro se Petitioner, DEBBY BOCK, respectfully prays that a writ of certiorari issue to review the

judgment of the United States Court of Appeals for the Second Circuit ("Circuit Court" or "Court below") entered on February 7, 1985.

OPINION BELOW

The Circuit Court entered its order and informal opinion on February 7, 1985 affirming the District Court's (EDNY "DC") dismissal of Petitioner's complaint. A copy of the order is attached (Appendix ("App.") A).

On April 3, 1985, the Circuit Court, without opinion, denied Petitioner's petition for reconsideration of its order which was treated by the Court as a petition for rehearing. A copy of the petition (App. B) and a copy of the order of the Court (App. C) is attached.

JURISDICTION

On February 7, 1985 the Circuit Court entered an order (App. A) affirming the dismissal of Petitioner's complaint. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).[1/]

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amend. I:

> Congress shall make no law respecting...abridging the freedom of speech...or the right of the people...to petition the government for a redress of grievances.

United States Constitution, Amend. IV;

> The right of the people to be secure in their persons...against unreasonable searches....

United States Constitution, Amend. V:

> Nor shall any person...be deprived of life, liberty, or property,

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1/ No other petitioner is involved in this petition.

without due process of law....

United States Constitution, Amend. VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

United States Constitution, Amend. VIII

> Nor cruel or unusual punishments inflicted.

United States Constitution, Amend. XIV (§1):

> Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

United States Code § 1361 of Title 28:

> Action to compel an officer of the United States to perform his duty.

United States Code § 1981 of Title 42:

> Equal rights under the law - U.S. Const. Amend. 14(§1); 18 USC § 241 et seq.; 42 USC § 1986; 28 USC § 1343.

United States Code § 1983 of Title 42:

> Civil action for deprivation of rights - U.S. Const. Amends. 1, 4, 5, 7, 8, 14(§1), 42 USC § 1985; 28 USC § 1343.

United States Code § 1985 of Title 42:

> Conspiracy to interfere with civil rights - U.S. Const. Amends. 1, 4, 5, 7, 8, 14(§1); 42 USC § 1983; 18 USC §§ 241, 242, 1501 et seq.; 28 USC § 1343.

United States Code § 1986 of Title 42:

> Action for neglect to prevent - 42 USC §§ 1981, 1985.

STATEMENT OF THE CASE

Throughout the Workers' Compensation Board's)"Board") and Board Panel's adjudication of Petitioner's work-related injury (Jan. 1977 - Jan. 1981, 23 hearings, 9 medical examinations ordered), there was no resemblance or safeguards as are available in the Workers' Compensation Law or in the Judicial process set by the federal administrative law. Respondents Slater, Posner and Christman (Panel) were appointed to review prior decisions of the Senior

Law Judge which were, in the main, favorable to Petitioner. The Senior Law Judge's decisions were based on a report of the Board medical examiner which was specifically requested by the insurance carrier in order to "resolve" the claim. The carrier appealed the decisions (DC Rec. Ex. 24 at pp. A 87 - A 88). Allowing only the carrier to state their case at oral argument and without reviewing the claim file, the Panel rendered their bias decision of Sept. 29, 1978 containing misstatements, errors and omissions in their findings; and under threat of termination of compensation and medical care if she did not comply, the Panel arbitrarily and capriciously ordered Petitioner to be re-examined by still another "impartial" orthopedist in addition to an examination by an "impartial" psychiatrist giving no explanation or

medical recommendation therefor, for which the Panel had no jurisdiction or expertise to recommend. Williams v. United States, 341 US 97, re use of force. Plaintiff was not counselled as to her right to submit to the psychiatric examination without medical recommendation for same. The orthopedist's perjured medical testimony which caused a negative determination to Petitioner, and the libelous and defamatory testimony by the psychiatrist caused her injury to her reputation and medical history which was the Panel's intention.

> An injury resulting from a failure due to a lack of reasonable diligence, to perform a mandatory duty imposed on a public officer by a statute that is designed to protect against the risk of such an injury, is actionable. 67 CJS § 251 at p. 782; 48 NY Jur. § 135.

Petitioner was not entitled to plead her case by oral or documentary evidence even after submission to the irregular

examinations (Tenney v. Brandhove, 341 US 367, 381-383 (1951); 5 USC § 556(d)); her case was not tried on the facts insulated from political influence (5 USC § 554(d)); the transcripts of testimony and exhibits have not been considered on the record for decision (5 USC § 556(e)); Petitioner was denied her right to know the findings and conclusions on all of th issues of fact, law, and discretion presented on the record (5 USC § 557(c)); th Panel have performed their duties inconsistent with their duties as hearing examiners (5 USC § 3105); and by extrinsi fraud Petitioner was denied her right to agency or judicial review of the Board's final decision of Jan. 9, 1981 (Workers Compensation Law § 23) at the Appellate Division - Third Department. (See also, Complaint ¶s #4-#21; DC Rec. Ex. 24 at A 102 - A 105, A 114, A 142, A 181.)

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For these reasons, Petitioner filed an Article 78 petition against the Respondents in the State Supreme Court, County of New York (DC Rec. Ex. 1). Justice Tyler of that Court denied Respondents' request to dismiss the petition and ordered them to answer it within 30 days (Complaint ¶ #22). Respondents are in contempt of that order to this date (Jud. Law § 753). Without permission of said Court, they suceeded in dismissing the petition at the Appellate Division - First Department by extrinsic fraud and false and fraudulent certifications (48 NY Juris. § 137) (Complaint ¶s #23-#38)

> [M]ere act of disobedience [of a court order], regardless of its motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices rights of a party. Great Neck Pennysaver, Inc. v. Central Nassau Publications, Inc., 1978, 65 AD2d 616, 409 NYS2d 544.

The decision of the Appellate Court was

improperly affirmed by the State Court of Appeals without opinion (Complaint ¶s #39-#44).

The District and Circuit Courts were in agreement that the State Court of Claims and Appellate Division - First Department had no jurisdiction over the case and therefore the State Court of Appeals was in error of law in affirming the First Department decision.

The Circuit Court did not address the imputations of Petitioner's oral argument or her brief, but instead manipulated Respondents' erroneous and insufficient facts when it rendered its final decision of February 7, 1985 (App. A) which states, at page 3, the following:

> N.B. Since this Statement does not constitute a formal opinion of this Court and is not uniformly available to all parties it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

The order and informal opinion of the Circuit Court did not address itself to the questions in Petitioner's brief. Its intention was to misrepresent material facts made with knowledge of its falsity and with the intention to wilfully obstruct justice. Said Court knew and affirmed that this case was never tried on its merits, as has been determined by the District Court in its Memorandum and Order ("M/O") filed June 18, 1984 (DC Rec. #36 at pp. 10-11). Both Courts also knew that the Appellate Division - Third Department has denied Petitioner her constitutional right to appeal the Board's final decision, in contravention of Workers Compensation Law § 23.

In their informal opinion the Circuit Court prejudicially omitted to mention Petitioner's Article 78 action in which Respondents are in contempt to date to

answer the petition by order of the State Supreme Court filed Sept. 18, 1981 (Complaint Ex. M-2). Great Neck Pennysaver, Inc., supra. They also knew that Respondents are also in contempt of District Court order dated October 4, 1983 (DC Rec. #6) to answer the complaint. The Circuit Court prejudicially mentioned in their opinion only three out of five grounds upon which Respondents untimely moved the District Court to dismiss the complaint (App. I; DC Rec. #36; and Plaintiff-Appellant's Brief ("P/A Br.") at pp. 43-46). They only mentioned the last three grounds to conceal and protect Respondents' aforementioned contempts. The first two issues raised by Respondents were res judicata and collateral review which were dismissed by the District and Circuit Courts. Therefore, these Courts prejudiced Petitioner in

dismissing the complaint since the allegations of the complaint, as well as the petition filed in the State Supreme Court, are deemed to be true when they have not been denied or answered.

> [P]laintiff may be granted judgment by default if defendant[s] fail[s] to answer interrogatories within time fixed by court.
> Hesse v. Brunner, 1959, DCNY, 172 F. Supp. 284; Trans World Airlines, Inc. v. Hughes, 1964, CANY, 332 F.2d 602.

The Circuit Court erroneously stated (at p. 3) that the relief sought was "for the Court to review the Board's decision". The relief "actually" stated many times in Petitioner's brief, if they bothered to read it, and at oral argument, is for her right to a trial by jury on the merits of the case to expose the illegalities by which the Board and the Third Department rendered their decisions in her claim in contravention of the Board, State and Federal rules and laws. The Circuit Court erred when it affirmed the District

Court's prejudicial decision to deny Petitioner her constitutional right to "petition the government for a redress of grievances" in a trial by jury. [I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Bell v. Hood, 327 US 678, 682. (See also, P/A Br. at pp. 33-34.)

When a trial on the merits will be had, the "overt acts" will arise. Some charges of the "overt acts" which the Circuit Court failed to examine are enumerated in Complaint Ex. C-C 1, H-I; DC Rec. Ex. 24 at POINT V; and in Petitioner's answering brief at the State Court of Appeals filed Mar. 10, 1983; and in Appellate Division - Third Department records which Respondents deliberately omitted when they submitted the poorly reproduced and incomplete Exhibits numbered 1-27 in the District Court.

> Misfeasance, malfeasance, malpractice, nonfeasance, or maladministration in the performance of official duties may constitute grounds for removal,.....
> 67 CJS § 122.

The Circuit Court also omitted stating in their opinion that Petitioner, on two different occasions, has appealed the Board's decisions at the Appellate Division - Third Department. By extrinsic fraud and in violation of Workers Compensation Law § 23, the Appellate Court twice remanded the case to the Board (DC Rec. Ex. 24 at pp. A 12 - A 188; at pp. 11-14; at pp. A 220 - A 223). The collusive acts of the Appellate Court with the Board was in its failure to process the appeal in accordance with the Civil Procedure Laws and Rules as well as its own rules.

> [O]ne who has been injured by agency action is...entitled to judicial review.
> 5 USCA § 702 (1976); Administrative Procedure Act § 10(a);

City of Rochester v. Bond, 603 F.2d 927, 931 (1979).

The last remand was made in spite of the Board's denial for reconsideration of its final order. (See, DC Court Exs. E, F, D, G, H, to be read in that chronological order.)

> If...the agency for any reason declines to reopen the matter, that decision itself would be statutorily reviewable order. Id. at 938.

The Circuit Court omitted, in the last paragraph of their order, that the Jan. 9, 1981 Board decision was a final "appealable order" and was rendered without a pretermination hearing.

> In considering whether a judgment is final and unconditional ..., court may consider it in light of entire record of proceedings in which it was rendered.
> 35 A.2d 449.

By extrinsic fraud, the Third Department rescinded its order granting Petitioner appeal of the final "appeal-

able order". 5 USCA §§ 701-706. (See, DC Rec. Ex. 24 at p. A - 142.)

In its order, the Circuit Court did not dismiss the culpability of the Chairman of the Board.

For reasons which are unexplained, they failed to state the additional reliefs requested in Petitioner's complaint (¶s #45 A, B, C, F and H) which include large sums of monies owed to Petitioner. They also omitted in their informal opinion that Respondents' brief, which was filed in default in the Court below, was never served upon Petitioner. However, the Circuit Court based their decision on the defaulted brief without Petitioner's right of reply.

These bias omissions were purposefully made to justify and confuse the facts for the purpose of dismissing the complaint in favor of Respondents.

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescription of remedy. (Emphasis added.) In re Gault, 387 US 1, 18; See also, P/A Br. at pp. 22 and 28.

The District and Circuit Courts have no knowledge of the case due to the fact that the case was never tried on its merits, which Respondents confirmed at oral argument in the Circuit Court (5 USC § 706); and due to Respondents' refusal to submit the extensive records of the prior proceedings in this case as described in Petitioner's affidavit (DC Rec. #35). "A finding of fact on no evidence is an error of law." Crowell v. Benson, 285 US 22, 52 S.Ct. 285. Similar to the final judgment of the Board, the manipulated final judgment of the District Court, subterfuged and inferred with erroneous facts, is invalid based upon findings

which are not supported by substantial evidence, and it was unlawful under the criteria set forth in § 706(2) of Title 5, United States Code; Land Purchasing Corp. of America v. Grunwald, 1959, 20 Misc.2d 175. Hence, the judgment of the Circuit Court is also invalid in affirming the District Court decision. Therefore, Petitioner has suffered additional economic injury (5 USC § 702) as well as additional damage to her person due to the quadrupled workload and unnecessary papers which had to be submitted and filed to argue this point because of administration negligence. Both Courts permitted Respondents to proceed in violation of the Federal Rules of Civil Procedure and of the Federal Rules of Appellate Procedure as outlined in Petitioner's brief filed in the Court below and in Appendix D, E, and H filed herein. Therefore, the decisions of both

Courts are biased.

A timely petition for reconsideration of the Circuit Court's order (App. B) was filed by the pro se Petitioner on February 22, 1985, pursuant to FRAP 40(a), to correct misstatements, errors and omissions in the informal Circuit Court opinion. It was denied without opinion by order filed April 3, 1985 (App. C).

On May 22, 1985, Petitioner filed a letter (App. D) with an attached detailed affidavit (App. E) addressed to both the Chief Judge and Circuit Executive of the Court respecting the obstruction of justice in processing her appeal.

> A...clerk of a court,...or other ministerial officer, and every deputy or subordinate of any ministerial officer, who mutilates, destroys, conceals, erases, obliterates, or falsifies any record or paper appertaining to his office, is guilty of a felony.

48 NY Juris. § 133 at p. 54;
Penal Law § 1838, subd. 1.

A copy of the affidavit (App. E) with a letter (App. F) were mailed on May 22, 1985 to the Director of Administrative Office of the United States Courts. A response dated June 6, 1985 on behalf of the Chief Judge was received by Petitioner from Elaine B. Goldsmith, Clerk of the Court (App. G) which did not address itself to the allegations made in Petitioner's letter and Affidavit (App. D and E). Petitioner then filed a verified complaint on June 12, 1985 (App. H), pursuant to Second Circuit Rule § 0.24, addressed to the Honorable Wilfred Feinberg, Chief Judge of the Second Circuit Court, respecting the judicial conduct of Judge Platt (District Court) and Judge Oakes (Presiding Justice, Circuit Court). To Petitioner's knowledge and belief, no action

has been taken on this complaint to date. Similarly to those described in Petitioner's affidavit (App. E), none of these letters have been docketed by the Clerk of the Court. FRAP 45(b) and (d).

REASONS FOR GRANTING WRIT

Where Petitioner had a right to an 'evidentiary hearing' prior to termination of benefits (Goldberg v. Kelly, 397 US 254 (1970)); and where Petitioner was denied a pretermination hearing of the Board's final "appealable" decision of Jan. 9, 1985 (DC Court Ex. D; Complaint ¶s #6-#15); and where Petitioner was denied, by extrinsic fraud, an appeal of the Board's final "appealable" decision at the Appellate Division - Third Department (Complaint ¶s #16-#20); and where Respondents are in contempt to date of the State Supreme Court order to answer the petition (Complaint

Ex. M-2); and where the State Court of Claims and the State Appellate Division - First Department had no jurisdiction over the matter and, by extrinsic fraud, illegally dismissed Petitioner's petition and, in violation of law, overturned the order of the State Supreme Court (Complaint ¶s #21-#37) which was illegally affirmed by the State Court of Appeals (Complaint ¶s #38-#44); and where purposeful errors, omissions and misstatements, in violation of FRCP and FRAP, were made in processing Petitioner's action in the District and Circuit Courts (P/A Br. POINTS I-III; Apps. B, D, E and H herein); and where Respondents were in default and in contempt of the District Court order in serving their answer upon Petitioner (DC Rec. #6, #12, #15 and Court Ex. B); and where the District Court, in error of law,

arbitrarily and capriciously "set aside" the entry of default and permitted a motion for dismissal of the Petitioner's complaint to be untimely filed by Respondents; and where Respondents have not served Petitioner with their untimely filed brief on Dec. 6, 1984 in the Second Circuit Court of Appeals in violation of Scheduling Order #2 filed Oct. 2, 1984 and in violation of Petitioner's filed brief on Oct. 30, 1984; and where the Circuit Court, in violation of law, arbitrarily assumed the role of Respondents' attorneys by mailing Respondents' brief to Petitioner, with public funds, without docketing it on the record, under US Post Office certified receipt #P580/266/848 and claim check #125126; and where Petitioner was denied her right to a reply brief; and where the first two grounds made by Respondents in their motion of res judicata and collateral

review were dismissed by the District Court (DC M/O at pp. 10-11, 12-13) and affirmed by order of the Circuit Court (App. A at p. 6); and where no answer to the allegations of the complaint was filed by the Respondents in the District Court; and where Petitioner was denied her right to a trial by jury (FRCP Rule 38(a)); and where the biased decisions dismissing Petitioner's complaint by the District and Circuit Courts were based on lies, misinformation and insufficient evidence submitted by the Respondents without a hearing on the merits; and where Petitioner was denied a rehearing on the District and Circuit Court's biased decisions, due process demands that this case be remanded to the District Court for jury trial on the merits which was the demand made in the heading of Petitioner's complaint (FRCP Rule 38(b); P/A Br. at p. 28).

It is not proper for an administrative agency to base a decision of an adjudicatory nature where there is a right to a hearing upon evidence or information [within and] outside the record. Matter of Simpson v. Wolansky, 1975, 343 NE2d 274, 277. If Petitioner's "rights" are at stake, then [she] is entitled to a hearing conducted in adversarial fashion in which standards of due process must be met. Matter of Hecht v. Monaghan, 1954, 121 NE2d 421. No essential element of a fair trial may be dispensed with. Matter of Sowa v. Looney, 1968, 244 NE2d 243. This means, for example, that a finding cannot rest heavily upon hearsay, in violation of the Petitioner's right to confront witnesses. Matter of Sabatini v. Kirwan, 1973, 348 NYS2d 379; Matter of Erdman v. Ingraham, 1967, 280 NYS2d

865. (Complaint ¶ #14; DC Rec. Ex. 24 at pp. 24-26; DC Court Ex. H.)

When the Board Panel threatened to terminate Petitioner's claim for compensation if she refused to be examined by the unskilled doctors and after submitting to said examinations the Board Panel nevertheless terminated her compensation without a pretermination hearing, these acts constituted an imposition of cruel and unusual punishment and were violations of her civil rights under 42 USCA §§ 1981, 1983, and 1985(2,3).

When the Board judge conspired with the "impartial psychiatrist to have Petitioner removed from the hearing room on Sept. 20, 1979 and deprived her of her right to defend herself as to stigmatizing and defamatory testimony given about her; and when the Board's employees conspired with her attorney to deprive her from

reading the transcript of the said hearing, these acts constituted an imposition of cruel and unusual punishment and were violations of her civil rights under 42 USCA §§ 1981, 1983, and 1985(2,3). In re Daniel A.D., 411 NYS2d 582.

> Doctor who prescribed...without proper medical basis was guilty of fraud and deceipt under Education L Sec. 6514. Tompkins v. Board of Regents, 87 NE2d 517.

The Board's unskilled doctors and inaccurate information poses a threat to Petitioner's treatment by physicians and medical records. No legal assurance that information will not be intercepted by someone wishing to do Petitioner harm. Inaccurate records can result in unjustified decisions by law enforcement agencies and innocent peoples' failure to get jobs. Wanton and reckless disregard for the

truth can create legal genocide against the working man and the public interest suffers.

> '[I]t is an effectual denial by a State of the equal protection of the laws when any class of officers...refuse to extend that protection...If the jurors... refuse to do justice...where the rights of a particular...citizen are concerned, and that State affords...no remedy, that is as much a denial to that...citizen of equal protection of laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this...[Petitioner].' 42 USCA § 1983; NYS Const. Art. 1(§ 11); Monroe v. Pape, 365 US 167 at p. 177.

The Board's effort to discredit Petitioner was for the purpose of taking attention away from the main issues which violated Petitioner's rights to due process of law. In an attempt to remove the cause of the violated rights, the Respondents, by extrinsic fraud, have succeeded in dismissal of the complaint without an answer and without sufficient

evidence.

> The "due process of law" clauses of federal and state constitution can be satisfied only when a person may be granted a hearing upon the merits before a competent tribunal where [she] may appear and assert and protect [her] rights. U.S.C.A. Const. Amend. 14; Const. N.Y. art 1, Sec. 6 Lyons v. Goldstein, 47 NE2d 425.

Contrary to Respondents' "strong suggestion" (DC M/O p. 5 at II) and when it dismissed the first two grounds of res judicata and collateral review (DC M/O pp. 10-11, 12-13, supra.), the District Court had authority to review Petitioner's claims. Federal District Court had jurisdiction of action against Respondents for violation of Petitioner's civil rights growing out of a Board order terminating her compensation without a pretermination hearing and denial by the Appellate Court of her civil right to appeal the final "appealable" Board order under Workers Compensation

Law § 23, thereby denying her right to due process of laws. USCA Const. Amends. 1, 4, 5, 7, 8, 14(§ 1); 28 USCA §§ 1331, 1343, 1361; 42 USCA §§ 1981 et seq., 1983, 1985(2,3), 1986; NYS Civil Rights Law § 40-c; NYS Const. Art. 1(§ 11).

> To justify dismissal for want of jurisdiction, alleged constitutional claim must be patently without merit. Ruffler v. Phelps Memorial Hospital, DCNY 1978, 453 F.Supp. 1062.

When Respondents failed to answer the allegations of the Petition by order of the State Supreme Court and of the complaint by order of the District Court, Respondents were and still are in contempt of those orders and the allegations are taken as confessed. It was unlawful for the District and Circuit Courts to ignore those contempts.

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which

> [Petitioner] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.
> Bell v. Hood, 327 US 678, 682; Hagan v. Levine, 415 US 528, 542.

Therefore, the District and Circuit Courts were in error of law (28 USC §§ 1331, 1343) in dismissing the complaint.

Judge Platt (EDNY) abused his discretion (Judiciary Law §§ 750, 753; 28 USCA § 144) when he prejudicially "set aside" or vacated the entry of default without "good cause" shown (P/A Br. POINT II at pp. 9-22). Where Respondents failed to answer the complaint as to a date in accordance with the Court order, and where no proof as to a date of mailing is made by

the Respondents, the date must be presumed to be the one most favorable to Petitioner. Tarpley v. Wilson, 33 Miss. 467; 27 CJS § 13; Great Neck Pennysaver, Inc., supra.; Hesse, supra. However, Petitioner submitted proof to the Court (DC Court Ex. B) of the wrapper of Respondents' untimely mailing of an irregularly submitted motion, instead of the answer to the complaint, on Nov. 10, 1983 with US Post Office certification receipt #P445/198/659 and claim check #238458.

Since no answer was submitted as a matter of law and in defiance of the order of the District Court,

> [A]verments in a pleading to which a responsive pleading is required...are admitted when not denied.... FRCP Rule 8(d).

It is not the province of the District Court to modify, revise or disregard the plain terms of a Rule of Civil Procedure made for its guidance (Wall-

ing v. West Virginia Pulp & Paper Co., 2 FRD 416). Attorneys should...conform to the Rules and not try to improvise new practice (Hargraves v. Bowden, 217 F.2d 839) and the courts should be particularly alert to prevent the liberal federal procedure from being used for purposes other than those intended by the framers of the Federal Rules (Service Liquor Distributors v. Calvert Distillers Corp., DCNY, 16 FRD 344). Federal district court had jurisdiction ...on equal protection claim based upon USCA Const. Amend. 14, under § 1331 of Title 28 (City of Highland Park v. Train, 1975, 424 US 927).

"Even if proxility [sic] is a vice in a professional pleader it may be excused in a pro se plaintiff." 56 FRD 601, 603 (1972, DCNY). A pro se litigant cannot be expected to have

the technical legal proficiency of a professional. Therefore, our courts have been granted the discretionary power to help.

Where generous reading of the pro se complaint (DC Rec. No. 1) and petition (DC Rec. Ex. 1) were attempting to allege that Respondents, under color of state law, subjected Petitioner to deprivation of her right to due process of law, District Court would preserve potential action of Petitioner under § 1343 of Title 28 relating to actions for deprivation of civil rights (Gregg v. State of Tenn., DC Tenn. 1976, 425 F.Supp. 394). A [Petitioner] charging violation of her civil rights by a conspiracy...is not required to list or plead [her] evidence. 42 USCA §§ 1983, 1985(2,3); Hoffman v. Halden, 268 F.2d 280, 282. Validity of a complaint for violation of civil rights

at the pleading stage cannot be disposed of on basis of presence of so-called conclusionary allegations of conspiracy ...or of acting under color of state law and authority, and such allegations as to those elements of the cause of action are proper and necessary. 42 USCA §§ 1983, 1985(2,3); Id. at 282. [W]here gravamen of injury complained of is [termination of compensation and medical care without evidence and without a pretermination hearing], the order of the court, right or wrong, is ordinarily the proximate cause of injury and various preliminary steps...can be said to be proximate cause of injury. 42 USCA § 1981 et seq., Id. at 283. Complaint and petition contend that the Board's "impartial" doctors had been hired by the State to perform a duty and therefore were acting for the State. Examinations by Board's unskilled

physicians can be "proximate cause" of injury. Moreover,

> The immunity of [officers and employees] under the [Workers Compensation Law and NY State Law] is lost when it conspires with employers. Id. at 301.

The district courts shall have original jurisdiction of any action in the nature of mandamus and compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff. 28 USCA § 1361.

[W]hen two or more persons conspire to violate the civil rights of an individual, acting under color of state law, if one or more of conspirators is a state officer, then the mere fact that certain of the other conspirators are not state officers "constitutes no defense to any of them under the Civil Right statutes". 42 USCA §§ 1981 et seq., 1983, 1985(2,3); Id. at 298. No immunity from liability is granted to state officials

under Civil Rights Act for willfully disobeying an order of the court [Complaint Ex. M-2]. 42 USCA § 1981 et seq.; Id. at 284. The reviewing court is bound by the record. Id. at 284. The Respondents did not submit the entire record of the prior proceedings when they moved to dismiss the complaint on issue of res judicata in the District Court. A record must be made, and the reviewing court is confined to that record in deciding whether the determination is supported by substantial evidence. Matter of Newbrand v. City of Yonkers, 33 NE2d 75.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof. APA § 10; 5 USCA § 702. Respondents abused their discretion in adjudicating Petitioner's claim in violation of her rights under the Administrative Procedure Act when they refused to comply with the Board's own rules (DC Rec. Ex. 1). The "overt acts" have been continuously appealed within the time limitations by the Petitioner. However, she was consistently prevented and denied her right to state her case on the merits before the State courts and later at the Federal courts.

> Where action...was...for negligence in permitting plaintiff to be treated by unskilled and incompetent agents and employees and it was brought within three years, the action was not barred by limitations.
> Golia v. Health Ins. Plan of Greater New York, 1957, 165 NE2d 578.

Additionally, the "overt acts" of the Respondents were in conspiring to deprive Petitioner of her right to

appeal the Board's final decision (Workers Compensation Law § 23) and of her right to a trial respecting the injuries sustained by her throughout the Board's improper adjudication of her claim, in violation of the Workers Compensation Laws and Board's own rules. (See, DC Rec. Ex. 1 and Complaint Ex. M-M2.) Respondents conspired and acted jointly with the employer and the insurance carrier. The purpose of Respondents' conspiracy was to impede, hinder, obstruct, interfere with and defeat Petitioner's right to due course of justice in the State with the purposeful intent to deny her the equal protection of the laws, equal privileges and immunities. 42 USCA 1985(2,3); NYS Civil Rights Law § 40-c; NYS Const. Art. 1(§ 11). The acts complained of were done in abuse of power under color of state

law and authority. 42 USCA § 1983. Petitioner was further injured in her person and was deprived of having and exercising her rights and privileges as a citizen of the United States by the acts done in furtherance of the conspiracy. 42 USCA § 1983. Respondents knowingly and negligently failed and refused to do ministerial acts which the law or legal authority absolutely required them to do. Therefore, a suit in damages is owing to Petitioner for the injury of nonperformance. 48 NY Jur. § 118; Beardsley v. Dolge, 143 NY 160, 38 NE 205; Adsit v. Brady, 4 Hill 630. Good faith and absence of malice constitute no defense in an action to hold a ministerial officer liable for damages caused by his or her nonfeasances or misfeasances. 48 NY Jur. § 120; Adsit v. Brady, supra. Respondents who failed to execute a

mandate according to its command, and made a return thereon of their proceedings, are liable to the aggrieved Petitioner for damages sustained by her, in addition to any other punishment or proceeding authorized by law. 48 NY Jur. § 122; Pub. Officers Law § 72-a.

> Validly issued administrative regulations may be treated as 'laws of the United States' for purposes of [§ 1331] stating that district courts have original jurisdiction of all civil actions arising under the 'laws ***of the United States.' Gonzales v. Chasen, 1980, 506 F.Supp. 990.

Moreover, the conclusion by the Circuit Court that public officials are always immune from suit for failure to provide adequate protection would be inconsistent with the language and purpose of the Civil Rights Act. The legislative history of the Act discloses that it was directed at the maladministration, neglect and

disregard of laws by state and local officials as in the instant case. The purpose of the Act was to provide a federal remedy for the deprivation of federally guaranteed rights. To hold that public employees enjoy an immunity under the Civil Rights Act similar to that which they may enjoy under state law would largely frustrate that purpose. Huey v. Barloga, 277 F.Supp. 864, 874. Cf. Jobson v. Henne, 355 F.2d 129, 135 (2d Cir. 1966).

The Fourteenth Amendment requires that state officials exercise [their] duty [to preserve law and order and to provide for personal safety of individuals] toward all classes of persons without distinction... Thus, where individuals attempt to use intimidation...against others as part of a system of discrimination, state

officials have a duty to take reasonable measures to protect the oppressed and [t]hey may not be allowed to escape [that] duty simply by asserting that it is merely a matter of individual discrimination. The neglect of this duty with knowledge of the use of force by one class of persons against another is tantamount to discrimination by state officials themselves. Such neglect, therefore, would be 'state action' of a fundamental nature and within the ambit of the Civil Rights Act. Huey, supra. at 864.

Petitioner's action for civil conspiracy under § 1985 is based on Respondents' "purposeful intent to discriminate", as enumerated in all her foregoing verified documents, petition, complaint, and briefs filed in the New York State courts, i.e., Workers Compensation Board, Appellate

Division - Third Department; Supreme Court, N.Y. County; Court of Claims; Appellate Division - First Department; Court of Appeals, and in the Federal District Court, Eastern District of N.Y., and the Federal Court of Appeals, Second Circuit. Said discrimination is continuous in that Petitioner has been and continues to be deprived of her right to a trial by jury on the merits. In addition, Petitioner's civil rights action "is also based on the federal statute giving a cause of action for neglect to prevent or aid in prevention of commission of the wrong conspired to be done. 42 U.S.C.A. § 1986." Hoffman, supra. at 285.

Respondents consciously tried and suceeded in influencing the law and were and are endeavoring to obstruct and interfere with it. Collins v. Hardyman, 1951, 341 US 651, 661. By

these acts done in furtherance of the conspiracy, Petitioner was further injured by the delays and expenses incurred by the actions forced to be taken in the courts below and Petitioner was and still is deprived of having and exercising her right and privilege as a citizen of the United States to redress of grievances, to be secure in her person against unreasonable searches, without inflicting upon her cruel and unusual punishment, to a suit at common law where the value in controversy exceeds twenty dollars, to a trial by jury, against enforcement upon her of orders which abridge the privileges or immunities enjoyed by the citizens of the United States in order to deprive her of life, liberty or property without due process of law and the equal protection of the law.

In Tenney v. Brandhove, 1951, 341 US 367, the Supreme Court held that the Civil Rights Act had not abolished the common law privilege of [State officers and employees] to be free from civil liability for acts done by [them] in the field where [they] traditionally have power to act. Hoffman, supra. at 298. Petitioner has been inflicted with cruel and unusual punishment in her effort to obtain her right to compensation for her work-related injury and denial of due process of laws.

[T]he broad scope of the Civil Rights Act would impose liability on state officers for acts done under color of law,—acts done within as well as without, the scope of their authority. (Emphasis supplied.) Hoffman, supra. at 299.

Petitioner came under the Board's

wrath after she made complaints against the noncompliance of the Workers Compensation Laws by Respondents which resulted in intimidation bordering on harrassment and verbal assault. As in Kelly v. Railroad Retirement Board, 1980 (3d Cir.), 625 F.2d 486, 495-496, when the Court stated:

> We will reverse the Board's decision without remand for further hearing...[claimant] has established that she satisfies the eligibility criteria for the disabled...Moreover, her application remained pending for nearly four years before the Agency issued its final order. Agreeing with the...Sixth Circuit when faced with an application that remained pending an unreasonable amount of time before the...Board, '[w] see no reason to remand the case for taking of further evidence.' *** Accordingly the decision of the Board is reversed and the case remanded to the Board for allowance of disability benefits to [claimant]. (Emphasis added.)

Petitioner avers, in addition to

her other allegations of damages, that her application at the Board "remained pending for...four years before the Agency issued its final order" (Jan. 13, 1977 - Jan. 9, 1981) and that the application "remained pending an unreasonable amount of time before the...Board." Therefore, the District and Circuit Courts' decisions conflict with that of the Third and Sixth Circuit Courts.

The District Court clearly stated at M/O pp. 12-13, which the Circuit Court affirmed, that: "While the defendants correctly note that, in this action, Mrs. Bock attacks the State Courts and their decision-making process, she does not, contrary to the defendants' arguments, seek to avoid, impeach or evade a State Court judgment. As noted above the State Court could not, and did not, reach the merits of the plaintiff's claim."

The complaint is not to be dismissed simply because the plaintiff fails to assert the proper legal theory. Rather [this] court is under a duty to examine the complaint and all the prior records to determine if there are grounds for relief on any possible theory. Huey, supra. at 872. See, also, Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944). The acts of individual conspirators resulting in the consummation of an alleged conspiracy can give rise to individual liability under § 1983. Moreover, § 1983 has been interpreted to support actions against individuals for a denial of equal protection of the laws. Huey, supra. at 873. See, also, Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963).

Respondents were unconcerned that they were committing malicious injury by

their refusals to answer Petitioner's letters respecting their determinations. Spalding v. Vilas, 161 US at 499. Respondents committed malicious acts and violated the fundamental principles of fairness embodied in the constitution when they permitted unlawful lengthy delays in delivery of compensation due Petitioner under the Workers Compensation Law, which was sufficient to state a claim for relief (Andujar v. Weinberger, DCNY 1976, 69 FRD 690); when they owed Petitioner clear, ministerial and nondiscretionary duty for advance notice and pretermination hearing with respect to termination of her compensation as mandated by due process clause of USCA Const. Amend. V (Maher v. Mathews, DC Del. 1975, 402 F.Supp. 1165); when they refused Petitioner on 35 different occasions the opportunity to be heard

at a hearing and present evidence; when they abused their authority by hearing only one side - that of the employers' insurance carrier; when they forcibly invaded Petitioner's privacy without reason or explanation therefor; when they performed duties inconsistent with their duties (5 USC § 3105).

Section 8 of the Court of Claims Act says that the State of New York waived its immunity from liability and consented to be sued in accordance with the same rules of law as applied to actions in the supreme court in order to do justice to persons who are damaged by the wrongs of public servants functioning as such. Bernadine v. City of N.Y., 294 NY 361, 365 (1945); cf. Sheehan v. North Country Community Hosp., 273 NY 163. Qualified immunity is based on good faith and reasonable grounds which Respondents have

not proven or even defended. Therefore, Petitioner has a right of civil liberty to claim the protection of the laws; a right to damages for invasion of her personal interests in liberty; and an action for damages for violation of the Fourth Amendment consequent upon the unconstitutional conduct of Respondents. Bivens v. Six Unknown Fed. Narcotics Agents, 403 US 388 (1971).

The District and Circuit Courts have consistently mistaken Petitioner's politeness for stupidity. Administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record (Butz v. Economu, 438 US 478, 517 (2d Cir. 1978)) and adhere to the form of law within the scope of their official authority (Barr v. Mateo, 360 US 564 (1959); Gregoire v. Biddle, 177 F.2d 579 (CA2 1949)).

In citing Powell v. Workmen's Compensation Bd. of State of New York, 327 F.2d 131 (1964), the Second Circuit Court contradicts itself in the instant case when it stated at 135:

> The complaint was dismissed on the ground that plaintiff had failed to exhaust a remedy said to be embraced by New York's administrative scheme for the granting of workmen's compensation, by not availing himself of the appeal procedure set forth in Section 23 of the New York Workmen's Compensation Law. That section provides for an appeal from "an award or decision" of the Workmen's Compensation Board to the New York Supreme Court, Appellate Division, Third Department. The court below also noted the availability under state law of a proceeding under Article 78 of the New York Civil Practice Act to secure an order requiring the Board to take action on plaintiff's claim.

Petitioner has "exhausted" all avenues and "availabilities" stated in the cited paragraph above and it is at these avenues and availabilities that Respondents have

refused to answer the allegations made, just as they refuse to answer the complaint in the District Court. This was known to the District and Circuit Courts. Therefore, the affirmation by the Circuit Court of the biased District Court order to dismiss the complaint is also biased and unjust.

It is incumbent upon this Court to examine why the Court below abused its power when it failed to adequately investigate the case and disregarded questions of law violated. This Court should also examine why the District Court ignored procedural rules and overstepped its authority in declining jurisdiction of this case, inasmuch as there were constitutional questions involved. This lack of responsibility causes a systemic breakdown as well as

unnecessary costs and unjust delays to those seeking justice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and informal opinion of the Second Circuit.

Respectfully submitted,

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